

**Testimony of Kevin J. Kennedy
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Joint Congressional Hearing

**Senate Judiciary Committee
Subcommittee on the Constitution**

**House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

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**Senate Joint Resolution 7
and
House Joint Resolution 21**

A Constitutional Amendment Concerning Senate Vacancies

Chairman Feingold, Chairman Conyers and Subcommittee Members:

Thank you for the opportunity to provide information to the Subcommittees on Wisconsin's procedures for conducting special elections to fill vacancies in the office of United States Senator. It is a special honor to be here. Wisconsin has a long history of relying on special elections to fill vacancies in the office of United States Senator dating back to the ratification of the 17th Amendment to the United States Constitution.

Please allow me to provide a brief background on the organizational structure of elections in Wisconsin followed by a description of our approach to conducting special elections to fill vacancies in the office of United States Senator. I will also provide a history on filling congressional vacancies in Wisconsin along with a discussion of the costs of conducting a statewide special election based on our experience in Wisconsin.

Introduction and Background on Wisconsin Election Administration

I have served as Wisconsin's non-partisan chief election official for more than 25 years. I am currently appointed by and report to a non-partisan, citizen board comprised of six former circuit court and appellate judges. The Government Accountability Board (G.A.B.) was created in February 2007 by 2007 Wisconsin Act 1. After the appointment and confirmation of the initial members and hiring of its Director and General Counsel, the G.A.B. replaced the bipartisan State Elections Board and non-partisan State Ethics Board on January 10, 2008.

The Board has general supervisory authority over the conduct of elections in the State of Wisconsin. I have compliance review authority over Wisconsin's 1,922 local election officials and their staffs. This means any complaint alleging an election official has acted contrary to law or abused the discretion vested in that official must be filed with the Government Accountability Board before it may proceed in court. I have the authority to order local election officials to conform their conduct to law.

Wisconsin has a voting age population of approximately 4.3 million citizens. There are almost 3.8 million registered voters in our Statewide Voter Registration System (SVRS). The estimated state population is 5.6 million.

The Board establishes training programs for local election officials. The Board is also required to certify the chief election inspector, the individual in charge of each of the state's 2,822 polling places. Wisconsin's elections are administered at the municipal level in our 1,850 towns, villages and cities. The municipal clerk, an elected or appointed non-partisan public official, is responsible for the recruitment and training of poll workers, selecting and equipping polling places, voter registration, absentee voting, acquisition of voting equipment and the conduct of elections. More than 25,000 poll workers, along with special voter registration deputies for Election Day registration, poll managers, runners and greeters, staff the polling places in our November general election every 2 years.

Wisconsin uses a paper ballot based voting system. Before the 2000 Presidential election, more than 80% of the votes in Wisconsin were cast using optical scan ballots. Currently the state has a mixture of optical scan voting devices (an estimated 90% of the votes cast), direct record electronic (DRE) touch screen voting devices with a voter verified paper trail (an estimated 5% of votes cast) and hand-counted paper ballots (an estimated 5% of votes cast.) All polling places have a supply of paper ballots.

Polling places open at 7:00 am and close at 8 pm for all Wisconsin elections. After the polls close, the results are counted at the polling place. The ballots, voting results and other supplies for state and federal contests are transported to the county clerk the next day. Wisconsin's 72 county boards of canvassers conduct a canvass of the votes within two days of the election and certify the results to our office.

In 71 counties, the county clerk is responsible for printing ballots, programming voting equipment, publishing notices and the conduct of the county canvass for state and federal elections. County clerks are elected on a partisan ticket in presidential years.

In the City of Milwaukee, a bipartisan Board of Election Commissioners oversees the work of Commission staff administering the same duties as the clerk in other municipalities. Similarly, in Milwaukee County, a bipartisan Board of Election Commissioners oversees the work of Commission staff canvassing and certifying the election results.

In the three most recent Presidential elections, Wisconsin was the focus of a spirited campaign between the major party candidates. The margin of victory was extremely narrow in 2000 and 2004. In 2000, less than 6,000 votes separated the two major party candidates out of more than 2.6 million votes cast, a 69% voter turnout. In 2004, less than 12,000 votes separated the two major party candidates out of more than 3 million votes cast, a 73% voter turnout. In 2008, more than 400,000 votes separated the two major party candidates out of almost 3 million votes cast for president, a 71% voter turnout.

Current Wisconsin Law on Filling U.S. Senate Vacancies

In the event of a vacancy in the office of United States Senator, Wisconsin law requires the vacancy be filled by special election. Wis. Stats. §7.18. See Exhibit 1 for the specific statutory language. Wisconsin also has a detailed set of statutory provisions governing the timing and conduct of special elections. Wis. Stats. §8.50. See Exhibit 1 for the applicable statutory language with respect to conducting special elections to fill vacancies in Congressional offices. The full text of the special election statute is set out in Exhibit 2.

A United States Senator submits his or her resignation to the Wisconsin Secretary of State. Wis. Stats. §17.02 (1). See Exhibit 1 for the specific statutory language. When a vacancy other than by resignation occurs in the office of United States Senator, the county clerk where the Senator resided at the time of election is required to notify the Government Accountability Board. Wis. Stats. §17.17 (1). See Exhibit 1 for the specific statutory language. The vacancy triggers the requirement to hold a special election to fill the office.

The Governor issues the order calling the special election, which is filed with the Government Accountability Board. Wis. Stats. §8.50 (1)(a). There is no deadline for the Governor to issue the order calling the special election. This provides the Governor with considerable flexibility in setting the date of the special election. The agency staff generally works with the Governor's office to determine the wording of the order and the timing of the election.

Notice of the election is given by publication of the order. The Government Accountability Board transmits a copy of the order to the county clerks, who arrange for immediate publication of the order. The county clerks also notify each municipality in the county of the special election. Wis. Stats. §8.50 (1)(b). The order specifies the office to be filled, the expiration date of the remaining term of office, the date of the election, the earliest date for circulating and the deadline for filing nomination papers, the name of the incumbent before the vacancy occurred and a description of how the vacancy occurred. Wis. Stats. §8.50 (1)(c).

Special elections occur between 9 and 11 weeks from the date the Governor issues the order calling the election. Unless the special election is called to coincide with a regularly scheduled election, at the time of issuing the order the Governor is required to set the date of the election between 62 and 77 days from the date of the order. Wis. Stats. §8.50 (2)(a).

The date of the special election determines the date of the primary along with the period for circulating and the deadline for filing nomination papers. The primary, if required, is held 4 weeks before the day of the special election, unless the special election is held on the day of a regularly scheduled election. The deadline for filing nomination papers and other documents required to appear on the ballot is 4 weeks before the date of the primary or the date on which the primary would be held if required. Nomination papers may be circulated no sooner than the day of the order. Wis. Stats. §8.50 (3)(a).

Wisconsin has 3 regularly scheduled election dates in its two-year election cycle: the first Tuesday of April in each year (the spring election) and the Tuesday after the first Monday in November of even-numbered years (the general election.) The spring primary is held on the third Tuesday in February if required. The partisan primary for the general election is held on the second Tuesday in September of even-numbered years. There are special provisions if a special election is called to coincide with a regularly scheduled election.

If a special election is called to coincide with a regularly scheduled election, the Governor may not issue the order for the election earlier than 92 or later than 49 days before the date of the regularly scheduled primary election. Wis. Stats. §8.50 (2)(b). This means the last date to order a special election to coincide with a regularly scheduled election is 7 weeks before the date of the primary associated with the regularly scheduled election. If required, the primary for the special election will be held on the same date as the primary for the regularly scheduled election. The deadline for filing nomination papers cannot be later than 5 weeks before the date of the special primary. Wis. Stats. §8.50 (3)(a).

As a practice, the Government Accountability Board staff works with the Governor's office to coordinate the timing of special elections to coincide with a regularly scheduled election if practicable in order to reduce costs. Three of the four special elections held in Wisconsin to fill vacancies in the office of Representative in Congress coincided with a

spring election. In addition, one special election to fill a vacancy in the office of United States Senator and one for a vacancy for the office of Representative in Congress were scheduled so the primary was held on the date of the regularly scheduled election and the special election was held 4 weeks later.

A primary is required in a special election for a partisan office, such as United States Senator, if there is more than one candidate of a recognized political party. The provisions for determining a political party is recognized and entitled to appear on the primary ballot are set out in Wis. Stats. §5.62. The specific statutory language is not included in the attachments for this testimony but may be found at:

<http://www.legis.state.wi.us/statutes/Stat0005.pdf>.

The county boards of canvassers convene not later than 9 am on the Thursday following the special election to canvass the election results and certify the vote totals to the Government Accountability Board. The canvass returns must be transmitted by the county clerk no later than 7 days following the primary and no later than 13 days following the special election. Wis. Stats. §8.50 (3)(e).

The only way to contest the election determination as the result of an alleged irregularity, defect or mistake is through a recount. Wis. Stats. §9.01 (11). The deadline for requesting a recount is 5 pm on the 3rd business day following the receipt of the last statement from a county board of canvassers. Wis. Stats. §9.01 (1)(a)1. The specific

statutory language is not included in the attachments for this testimony but may be found at: <http://www.legis.state.wi.us/statutes/Stat0009.pdf>.

Wisconsin also has some specific provisions with respect to the timing of special elections for Members of Congress to ensure a vacancy is filled quickly and in a cost efficient manner. In the event the right to hold office ceases after a United States Senator or a Representative in Congress is elected and before the beginning of the term, a special election is called. Wis. Stats. §8.50 (4)(h). If a vacancy occurs after the beginning of the ballot access period for the November general election, the special election must coincide with the general election. If the vacancy occurs after the close of that period, the second Tuesday in July of even-numbered years, the special election is held after the general election. If the vacancy occurs after the second Tuesday in May in the year the office will appear on the ballot, the vacancy is not filled because the office will be filled at the regularly scheduled election.

History of Congressional Vacancies Filled by Special Election

Wisconsin has had 7 special elections to fill vacancies in offices held by Members of Congress. Interestingly, the 3 U.S. Senate vacancies all occurred more than 40 years ago, while the 4 vacancies in the office of Representative in Congress occurred in the last 40 years. The most recent special election to fill a Congressional vacancy was held in May, 1993.

The first special election to fill a vacancy in the office of Representative in Congress was held on April 1, 1969, when the Honorable David Obey was elected to fill the vacancy created by the resignation of Congressman Melvin Laird to become Secretary of Defense in the Nixon administration. The special election and the primary coincided with the regularly scheduled spring election that year. Similarly, Representative Thomas Petri was elected in a special election on April 3, 1979 that coincided with the regularly scheduled spring election. Representative Petri was elected to fill the vacancy created by the death of Congressman William Steiger on December 4, 1978 shortly after being reelected in November. Both Congressman Obey and Congressman Petri continue to serve Wisconsin in the House of Representatives.

On April 3, 1984, Gerald Kleczka was elected in a special election to fill the vacancy created by the death of Congressman Zablocki on December 3, 1983. The special election and the primary coincided with the regularly scheduled spring election that year.

On May 4, 1993, Peter Barca was elected in a special election to fill the vacancy created by the resignation of Congressman Les Aspin to become Secretary of Defense in the Clinton administration. The special election was called so that the primary coincided with the regularly scheduled spring election that year.

The first two vacancies in the office of a United States Senator from Wisconsin were filled by an election of the Legislature. The first special election to fill a vacancy in the office of a United States Senator from Wisconsin was held on May 2, 1918. Irvine Lenroot was elected to fill the vacancy created by the death of Senator Paul Husting on

October 21, 1917. The special election was called so that the primary coincided with the regularly scheduled spring election that year.

On September 29, 1925, Robert M. La Follette, Jr. was elected to fill the vacancy created by the death of his father, Senator Robert M. La Follette, Sr. on June 18, 1925. The most recent special election to fill a vacancy in the office of a United States Senator from Wisconsin was held on August 27, 1957 when William Proxmire was elected to fill the vacancy created by the death of Senator Joseph McCarthy on May 2, 1957. Interestingly, this special election led to a statutory change in the manner in which a United States Senate vacancy was filled.

History on Wisconsin Law of Filling U.S. Senate Vacancies

From the time Wisconsin became a state in 1848 until the ratification of the 17th Amendment to the United States Constitution in 1913, United States Senators were selected by the Legislature including the 2 occasions when vacancies occurred during a Senator's term of office. In 1913, the State Legislature provided that vacancies in the office of United States Senator may be filled at a special election. Laws of 1913, Chapter 634. In 1919, the Legislature provided that vacancies in the office of United States Senator shall be filled by special election. Laws of 1919, Chapter 362, Section 30. This requirement continued until 1957.

Following the death of Senator McCarthy, the Legislature changed the requirement for filling vacancies in the office of United States Senator by special election to a temporary appointment by the Governor until the next regularly scheduled general election. Laws of 1957, Chapter 647. The change was apparently spurred by dissatisfaction with the immediate scheduling of a special election to fill the vacancy caused by Senator McCarthy's death. However, the change was not effective for filling that vacancy since it occurred after the vacancy was created. The change remained in effect until 1986 when the Legislature removed the language providing for a temporary appointment by the Governor and require a special election to fill the vacancy. 1985 Wisconsin Act 304, Section 133g.

Election Related Costs – Primary and General

It is a challenge to get a reliable estimate on the cost of conducting elections because election administration is very labor intensive and because the costs vary by county and municipality. However, based on information currently available, I estimate the cost of a statewide special election in Wisconsin to fill a vacancy in the office of United States Senator would be approximately \$3 million. This does not include the cost of conducting the primary which would be less. It also does not include the cost for staff hours related to the conduct of the election that are part of the current salary of those government employees administering the election at the municipal, county and state levels. See Exhibit 3 for a line item listing of estimated costs.

In Wisconsin a number of government employees are involved in the successful conduct of an election. These employees work in the Elections Division of the Government Accountability Board, in the offices of 71 county clerks and in the offices of 1,849 municipal clerks. In addition, both the city of Milwaukee and Milwaukee County have a full time Election Commission staff.

Government Accountability Board staff are responsible for preparing the election notices for county clerks, processing ballot access documents including nomination papers and certifying candidates for the ballot. The staff generally works with the Governor's office to determine the wording of the order and the timing of the election. Election results are transmitted to the staff for certification and preparation of the certificate of election. In the case of the election of a United States Senator, the certificate of election prepared by the agency staff is signed by the Governor.

About 880 hours of Elections Division staff time would be devoted to the administration and conduct of a statewide special election. This includes set up of the Statewide Voter Registration System (SVRS) to enable local election officials to track absentee voting and print poll lists. This also includes Election Day responsibilities such as fielding inquiries from voters, election officials and the media along with monitoring voting activity and our random Election Day polling place accessibility and security audits.

Wisconsin is a paper based voting jurisdiction. Seventy-one county clerks and the Milwaukee County Board of Election Commissioners are responsible for publishing

certain election notices, printing the ballots and programming the electronic voting equipment. The counties use a format developed by the Government Accountability Board staff to prepare and publish the Type A Notice of Election and the Type B Sample Ballot and Voting Instructions Notice. Copies of the Type B Notice are also distributed to the municipalities for posting in the polling place on Election Day. The estimated county notice publication costs for a special election are \$84,600. This cost may vary due to the number of publications used in a given county.

For a special election to fill a vacancy in the office of United States Senator, counties would prepare as many as two and a half million (2,500,000) optical scan and paper ballots at an estimated cost of twenty cents each. Approximately one and a half million (1,500,000) ballots would be printed for a special primary election because of the projected lower turnout.

Wisconsin uses optical scan voting equipment to count more than 90% of all ballots cast including absentee ballots. In addition the state uses almost 1,000 ballot marking devices and 1,650 DRE touch screen voting devices to ensure individuals with disabilities are able to vote privately and independently. Based on figures provided by voting equipment vendors it would cost counties approximately \$540,000 to program the electronic voting equipment used in a special statewide election. Some of this cost would not be a direct charge in those counties who rely on staff resources to program their electronic voting equipment.

Counties are also responsible for conducting the post-election canvass based on the returns received from the polling places. The official vote totals are then transmitted to the Government Accountability Board for certification.

At least 28,160 hours would be put in by county staff to administer a statewide special election. County staff must prepare and proof election notices for publication, prepare and proof ballots for printing, proof returned ballots, package and distribute them to municipal clerks and test voting equipment. In Wisconsin all counties also assist municipalities with maintaining the Statewide Voter Registration System (SVRS) and printing poll lists. The estimated amount of county staff time is based on the assumption that in 60 counties, 2 persons will put in at least 176 hours (one work month), in 8 larger counties, 3 persons will put in at least 176 hours and in the 4 largest counties, 4 persons will put in at least 176 hours administering a special statewide election.

While Government Accountability Board and county staff play a significant role in administering elections in Wisconsin, our 1,849 municipal clerks and the staff of the Milwaukee City Election Commission are responsible for the actual conduct of the election. These dedicated municipal officials set up and equip the polling places; recruit, train and pay the poll workers; as well as process absentee ballots. When it comes to running elections in Wisconsin, the rubber meets the road at the municipal level.

Municipalities are responsible for preparing and publishing the Type D Notice informing the public of polling place locations and hours. They also prepare and publish the Type E

Notice providing information on absentee voting for the public. The estimated cost for publishing these notices for a statewide special election is \$59,500.

Municipal election officials are responsible for ensuring polling places are staffed with knowledgeable, helpful and dedicated poll workers. Wisconsin has almost 3,000 polling places staffed by a minimum of 3 poll workers. In a statewide special election, it is assumed there would be an average of at least 5 poll workers at each polling place. Some smaller municipalities may be able to rely on the minimum staffing level. Wisconsin law requires poll workers receive a reasonable daily compensation. Wis. Stats. §7.03 (1). The amount of compensation varies by municipality with many paying minimum wage, some a daily stipend of less than \$75 and others paying a “living” wage. For the purpose of estimating costs for a statewide special election, it was assumed that 15,000 poll workers would receive compensation equal to 16 hours at the state minimum wage. This amount would be less in a special primary because less poll workers would be needed.

Wisconsin has a relatively low number of absentee voters compared to other states. However, the number has steadily increased from less than 5% of all votes cast in elections before 2000 to more than 6% in 2000, more than 12% in 2004 and almost 18% in 2008. Many of these votes are cast in the office of the municipal clerk, but a significant number are cast by mail. Municipal election officials put in an extraordinary amount of hours processing absentee ballots cast in person as well as those cast by mail. For the purpose of estimating the costs of a statewide special election it is assumed at

least 250,000 absentee ballots will be mailed to voters with return postage included at a total cost of \$1.00 per absentee ballot.

The number of local election officials serving at the municipal level varies based on the size of the municipality and whether the clerk is elected or appointed. In the City of Milwaukee there is a core staff of 7 employees which is augmented by temporary staffing for regularly scheduled election events. Many municipal clerks are part time. For some, their municipal clerk duties are done after working a day job elsewhere. This makes it virtually impossible to determine the number of hours municipal election officials, other than poll workers, would put in to administer a statewide special election.

Conclusion

Elections are the cornerstone of our democracy. Since 1913, Wisconsin has committed to filling vacancies in the office of United States Senator by holding a statewide special election. This enables Wisconsin voters to actively participate in determining their federal representative in the United States Senate rather than delegating the selection to their Governor, even for a short period of time until a regularly scheduled election. It comes at a price, but the conduct of fair, transparent elections provides the foundation for public confidence in their elected representatives.

Thank you for the opportunity to share my thoughts with you. I would be happy to answer any questions Subcommittee members may have.

Respectfully submitted,

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